E-FILED on 8/8/06

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

KARL N. KAUFFOLD, Plaintiff, v. JO ANNE B. BARNHART, Commissioner of Social Security, Defendant.	No. C-03-05244 RMW ORDER GRANTING DEFENDANT'S MOTION TO DISMISS **[Re Docket No. 9]**

The Commissioner of Social Security ("Commissioner") moves to dismiss plaintiff Karl Kauffold ("Kauffold")'s complaint seeking review of the Commissioner's denial of Kauffold's application for disability insurance benefits under Title II of the Social Security Act, 42 U.S.C. §§ 401-433. Kauffold opposes the motion. Although the Commissioner has yet to file a reply, the time for doing so has lapsed.[1] For the reasons set forth below, the court finds that it has jurisdiction to hear the motion and make a decision on it. The court finds that dismissal of the case is appropriate.

[1] Kauffold filed his opposition on June 14, 2004. Because the Commissioner has failed to file a reply, the court assumes that the Commissioner considers the matter submitted without further argument. *Cf. Ladarski v. Bowen*, 1988 WL 251994 *1 (N.D. Cal. 1998) ("[b]ecause the Secretary's opposition is long overdue, the court will rule on the pending motions on the basis of the papers now before it").

I. BACKGROUND

Kauffold applied for disability benefits on October 20, 2000. The Commissioner denied Kauffold's application. Gould Decl. Supp. Mot. Dism. ("Gould Decl.") Ex. 1. Kauffold requested reconsideration on April 16, 2001. *Id.* at Ex. 6. The Commissioner upheld the initial decision on June 27, 2001. *Id.* at Ex. 1. On April 3, 2002, Kauffold claims he called the Gilroy Social Security Office ("the Gilroy Office") and was told that the Commissioner had denied his reconsideration request. *Id.* at Ex. 2. On April 18, 2002, Kauffold's attorney wrote to the Gilroy Office and requested a copy of the Commissioner's decision. *Id.*

On July 2, 2002, Kauffold requested an administrative hearing before an Administrative Law Judge ("ALJ"). *Id.* at Ex. 3. Kauffold acknowledged that he had failed to request a hearing within sixty days of the Commissioner's denial of his reconsideration request as mandated by 20 C.F.R. § 404.933(b). *Id.* However, Kauffold argued that neither he nor his counsel had received notice that the Commissioner had denied his reconsideration request. *Id.* Kauffold asked the ALJ to find that he had "good cause" for his untimely hearing request. *Id.* However, the ALJ found that Kauffold had not shown good cause. Gould Decl. Ex. 5. The ALJ reasoned that "the file shows that a notice of reconsideration was sent to the claimant and [his] representative" and that "[t]here is no indication that the notice of reconsideration was returned by the post office." *Id.*

On August 8, 2003 Kauffold sought review of the ALJ's dismissal in the Appeals Council. Gould Decl. Ex. 6. On September 25, 2004 the Appeals Council declined to review the ALJ's dismissal. Gould Decl. Ex. 7. Kauffold now seeks review in this court.

II. ANALYSIS

A. Final Decision Requirement

The Social Security Act allows a claimant to seek review of a "final decision" by the Commissioner "after a hearing" provided that the claimant does so within sixty days:

> Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party . . . may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision . . . . No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided.

42 U.S.C. §§ 405(g). "A claimant's failure to exhaust the procedures set forth in . . . 42 U.S.C. § 405(g) deprives the district court of jurisdiction." *Bass v. Soc. Sec. Admin.*, 872 F.2d 832, 833 (9th Cir. 1988) (per curiam). Here, Kauffold admits that because he did not challenge the Commissioner's denial of his reconsideration request within sixty days, he has not received a "final decision . . . after a hearing" and thus has not exhausted his administrative remedies. *See* 20 C.F.R. § 404.955(a), 404.968(a)(1). However, Kauffold urges this court to waive the exhaustion requirement. Courts can do so when a claimant possesses a constitutional claim that is "(1) collateral to a substantive claim of entitlement, (2) colorable, and (3) 'one whose resolution would not serve the purposes of exhaustion.'" *Anderson v. Babbitt*, 230 F.3d 1158, 1164 (9th Cir. 2000) (quoting *Hoye v. Sullivan*, 985 F.2d 990, 991 (9th Cir. 1992)). This "exception applies to any colorable constitutional claim of due process violation that implicate[s] a due process right [either] to a meaningful opportunity to be heard or to seek reconsideration of an adverse benefits determination." *Evans v. Chater*, 110 F.3d 1480, 1483 (9th Cir. 1997) (internal quotation omitted) (alteration in original). Kauffold argues that he has a procedural due process right to present evidence to the ALJ in that neither he nor his lawyer received notice that his reconsideration determination had been denied.

1. Collateral Claim

A constitutional claim arising out of a determination by the Commissioner is "collateral" when it is sufficiently divorced from the merits of the disability claim. *See Boettcher v. Sec. of Health & Human Servs.*, 759 F.2d 719, 721 (9th Cir. 1985) (holding that plaintiff's claim that the Secretary violated his due process rights by holding a hearing on all issues rather than the one issue he was prepared to discuss was "collateral" because it was "procedural, not substantive"). Kauffold's due process claim focuses entirely on whether he received proper notice of the Commissioner's reconsideration determination and therefore is "collateral" to his benefits claim.

2. Colorable Claim

The "colorable" requirement has two components. First, the plaintiff must show that "refusal of the relief sought will cause injury which retroactive payments cannot remedy." *Cassim v. Bowen*, 824 F.2d 791, 795 (9th Cir. 1987). Kauffold's due process claim meets this requirement. Even if

Kauffold files a new application and succeeds, the Commissioner has indicated that his benefits will begin nearly two years after his initial application. Obviously, when the Commissioner has foreclosed the possibility of Kauffold actually obtaining retroactive payments, retroactive payments are not available as a remedy..

The second prong of the "colorable" test requires that the constitutional claim not be "insubstantial, immaterial, or frivolous." *Boettcher*, 759 F.2d at 722. Kauffold's claim has the requisite modicum of merit. "[A]pplicants for social security disability benefits are entitled to due process in the determination of their claims." *Holohan v. Massanari*, 246 F.3d 1195, 1209 (9th Cir. 2001). Courts have routinely held that allegations of defective notice rise to the level of "colorable" due process violations. *See Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) ("[t]he essence of due process is the requirement that a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it") (quotation omitted); *Giacone v. Schweiker*, 656 F.2d 1238, 1244-45 (7th Cir. 1981) (Secretary violated plaintiff's due process rights by not timely informing him that he could present evidence establishing "good cause" for untimely reconsideration request); *Gipson v. Harris*, 633 F.2d 120, 122 (8th Cir. 1980) (plaintiff's claim that Secretary should have informed his attorney of reconsideration request was "sufficiently colorable to have conferred the district court with subject matter jurisdiction"); *Lodarski v. Bowen*, 1988 WL 251994, *4 (N.D. Cal. 1988) ("the courts will exercise jurisdiction over constitutional due process claims only where the claimant can make a preliminary showing that he or she has not been given adequate notice"); *Matlock v. Bowen*, 1988 WL 252440, *4 (N.D. Cal. 1988) (opining that plaintiff would have colorable constitutional claim if he had argued that he did not receive notice in time to appeal adverse determination). Kauffold asserts that neither he nor his attorney received notice of the Commisioner's denial of his request for benefits. Although Kauffold has apparently not filed a sworn statement to that effect, Kauffold's attorney has sworn under penalty of perjury that she did not receive notice. Gould Decl. Exs. 1, 6. As a result, Kauffold's claim is not "insubstantial, immaterial, or frivolous" and is "colorable." *Boettcher*, 759 F.2d at 722.

3. Exhaustion Would Be Futile

The final aspect of the test—that waiver serve the purposes of exhaustion—hinges on "whether exhaustion would be futile, meaning that nothing could be gained from permitting further administrative proceedings." *Anderson*, 230 F.3d at 1164. Agencies may use the exhaustion requirement to "compile a detailed factual record and apply agency expertise in administering its own regulations[,] . . . conserve judicial resources . . . [and] . . . correct its own errors through administrative review." *Johnson v. Shalala*, 2 F.3d 918, 922 (9th Cir. 1993).

Here, Kauffold has already undergone two administrative hearings on his claim.[2] It thus does not appear that further compilation of the factual record is necessary. "[C]ourts are empowered to find futility where the claimant demonstrates that 'there [i]s nothing to be gained from permitting the compilation of a detailed factual record, or from agency expertise." *Briggs*, 886 F.2d at 1140 (quotations omitted). Because the facts of Kauffold's claim have been sufficiently developed, exhaustion would be futile. Accordingly, the court waives the exhaustion requirement and, therefore, will entertain Kauffold's claim that the sixty-day time limit for filing an action in this court should not be applied to bar Kauffold's claim for benefits as untimely.

C. Kauffold's Claim Is Properly Dismissed as Untimely

Kauffold did not file his action in this court within sixty days of the Commissioner's denial of his reconsideration request. In fact, the denial of Kauffold's reconsideration request was on June 27, 2001 and Kauffold did not request a hearing before an ALJ on that denial until July 2, 2002. On July 25, 2003 an ALJ dismissed Kauffold's request. After an unsuccessful request of review of the dismissal, Kauffold filed his claim for benefits in this court on November 20, 2003.

Kauffold asserts that his claim should be considered timely because neither he nor his counsel received notice of the denial of his request for reconsideration. Counsel asserts she first received notice of the denial on April 3, 2002 when she called to check on the status of the reconsideration request that had been filed approximately a year earlier on April 16, 2001.

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[2] The Commissioner denied Kauffold's initial application for disability benefits on October 20, 2000. Gould Decl. Ex. 1. The Commissioner also denied Kauffold's request for reconsideration on April 16, 2001. *Id.* at Ex. 6.

"There is a presumption of regularity in the performance of their duties by government officials." *Red Top Mercury Mines, Inc. v. U.S.*, 887 F.2d 198, 202-203 (9th Cir. 1989). Here, the social security claims file reflects that notice of the reconsideration determination was sent to claimant at his correct address on June 27, 2001 with a copy going to his counsel at her correct address. Neither notice was returned by the post office. Neither claimant nor his counsel apparently checked on the status of the claim until April 3, 2002. The claim of claimant's counsel that neither she nor claimant received notice of the denial is not sufficient cause to overturn the presumption that notice was sent. Even if claimant and his counsel did not receive notice, no persuasive reason has been offered to explain their delay in checking on the status of the reconsideration request.[3]

III. ORDER

For the foregoing reasons, the court grants the defendant's motion to dismiss and will enter judgment in favor of the Commissioner.

DATED: 7/31/06

Ronald M. Whyte

RONALD M. WHYTE
United States District Judge

[3] Notice to claimant alone is sufficient. *See Gipson v. Harris*, 633 F.2d 120, 122 (8th Cir. 1980). It is unclear whether claimant himself claims he did not receive notice. He apparently did not file a declaration or affidavit so stating (at least the court finds no such declaration or affidavit in its file)

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Counsel are responsible for distributing copies of this document to co-counsel that have not registered for e-filing under the court's CM/ECF program.

Dated: 8/8/06

SPT
Chambers of Judge Whyte